STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5304 (S.C. Ct. App. filed March 18, 2015)

2007-GS-32-525, 2008-GS-32-2652, & 2008-GS-32-2653

THE STATE,

RESPONDENT,

V.

KENNETH ANDREW LYNCH,

PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 6, 2015. App. 39-40.

QUESTIONS PRESENTED

I. Did the prosecution fail to present substantial circumstantial evidence of Petitioner's guilt entitling Petitioner to a directed verdict?

II. Did the trial court's refusal to use an instruction explaining how to use circumstantial evidence during his deliberations and evaluation of the evidence as fact-finder violate Petitioner's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt because the instruction used failed to clarify how to evaluate circumstantial evidence?

III. Was the arrest warrant for grand larceny of a motor vehicle supported by probable cause, as required by the federal and state constitutions, where the affiant omitted vital information?

STATEMENT OF THE CASE

On February 5, 2007, a Lexington County grand jury indicted Petitioner for grand larceny (2007-GS-32-525). On August 11, 2008, a Lexington County grand jury indicted Petitioner for two counts of murder (2008-GS-32-2652 & 2008-GS-32-2653). R. 1871. The Eleventh Circuit Solicitor's Office served Petitioner with notice to seek of intent to seek the death penalty. The matter proceeded to a bench trial before the Honorable Eugene C. Griffith, Jr. on April 16, 2012. Donald Myers, Samuel Hubbard, and David Graham prosecuted Petitioner. William McGuire, Benjamin Stitely, and Eric Drylie represented Petitioner. R. 1. After the guilt phase of the trial, the judge found Petitioner guilty as charged. R. 1793, line 21 – R. 1794, line 3. At the conclusion of the sentencing phase, on May 8, 2012, the judge sentenced Petitioner to two consecutive terms of life imprisonment on the murder convictions and to a sentence of ten years' imprisonment for the grand larceny conviction. R. 1797, line 9 – R. 1802, line 10; R. 1870. By a motion filed on May 17, 2012, Petitioner moved for a new trial, which was denied by written order. R. 1868-1870.

Petitioner filed a timely notice of appeal, which was perfected by undersigned counsel. After oral argument on February 3, 2015, three judges of the Court of Appeals, the Honorable Paul E. Short, Jr., the Honorable James E. Lockemy, and the Honorable Stephanie P. McDonald, affirmed Petitioner's convictions and sentences in a published decision. State v. Lynch, Op. No. 5304 (S.C. Ct. App. filed Mar. 18, 2015); App. 1-22. Petitioner filed a timely petition for rehearing. App. 23-37. On May 5, 2015, the Court of Appeals denied the petition for rehearing. App. 39-40.

Petitioner respectfully requests this Court grant certiorari to review the Court of Appeals' opinion.

ARGUMENT

I. The prosecution failed to present substantial circumstantial evidence of Petitioner's guilt; therefore, Petitioner is entitled to a directed verdict.

Relevant facts

Petitioner, Portia Washington, and Portia's minor granddaughter, Angelica Livingston lived together in an apartment. R. 107, line 15 – R. 108, line 12; R. 117, lines 3-8; R. 134, lines 19-21; R. 143, lines 6-7; R. 156, lines 3-13; R. 180, lines 15-16; R. 199, lines 8-11; R. 247, line 14 – R. 248, line 6; R. 265, lines 20-22; R. 315, lines 16-17; R. 316, lines 10-20; R. 319, lines 18-24; R. 799, lines 3-8; R. 1663, lines 5-13; R. 1666, lines 19-21. Portia's aunt, Vernelle Bellamy, saw Portia twice on June 10, 2006. During the first visit, Portia gave money to Bellamy to use while shopping. Later in the day, Bellamy gave a pantsuit to Portia. Bellamy was unable to recall the exact time of these visits. R. 235, line 22 - R. 237, line 81. Carla Perry, who lived in the same complex as Petitioner, Portia, and Angelica, last saw Portia, Angelica, and Petitioner during the afternoon hours on June 10, 2006 when Portia was getting some things from her car. R. 178, line 22 – R. 181, line 21; R. 182, lines 17-25. At approximately 10:30 p.m., Perry noticed that Portia's car was not in the parking lot and that Portia's apartment was dark. R. 184, line 11 – R. 185, line 11.

Portia's car played a central role in the prosecutor's case. On June 22, 2005, Portia purchased a 2005 Ford Focus. R. 898, line 1-899, line 18. Supposedly, Portia had given Sallie Jones, her mother, the second key to Portia's new car because she did not want Petitioner driving her car anymore. R. 202, lines 5-6; R. 203, line 14 – R. 207, line 3. However, on cross-examination, it was established that Petitioner had driven Angelica to her house in Portia's car on multiple occasions. R. 225, lines 15-23. Harry Wertz, a co-worker, also recalled that Petitioner

was driving Portia's car on Friday, June 9, 2006 when Portia and Petitioner left work. [1] R. 789, lines 13-16. Portia was "very happy" on Friday when she left work with Petitioner. R. 792, lines 18-22.

On June 13, 2006, Bellamy received a call because Portia was not at work. R. 238, lines 7-24. Concerned, she went to the apartment Petitioner and Portia shared. R. 241, lines 7-14; R. 242, lines 19-21. The apartment manager found nothing out of the ordinary inside. R. 243, lines 1-18. On June 14, 2006, Shane Phillips, a West Columbia Police Department (WCPD) officer, entered the apartment to conduct a welfare check. R. 1158, lines 18-22; R. 1159, lines 12-24. He found "nothing was disheveled, nothing messed up, no sign of any kind of struggle or anything like that." R. 1163, line 8 – R. 1165, line 16. Phillips then entered Portia's information into the NCIC as a missing person. R. 1163, lines 2-7. Later that day, Phillips returned to the apartment with WCPD officer April Bayne for an alleged *second* "welfare check." R. 1220, line 24 – R. 1221, line 1. Bayne looked in all of the rooms, opened drawers, and even removed items from the drawers. R. 1238, lines 12-15; R. 1241, lines 9-15; R. 1242, lines 17-20. Bayne took photographs during her search. R. 1243, line 18 – R. 1246, line 20; R. 1250, line 4 - R. 1251, line 11; R. 1253, line 4 - R. 1254, line 7.

An officer stopped Petitioner for speeding on June 14, 2006 in Texas. R. 661, lines 19-21; R. 662, lines 11-15; R. 663, lines 8-12; R. 667, lines 9-12; State's Exhibit #29. Petitioner was driving a 2005 Ford Focus registered to Portia. R. 664, lines 21-25; R. 665, lines 6-16. Petitioner informed the officer that he was going to Arizona to pick up his wife.[2] R. 671, line 21

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[1] Petitioner and Portia worked at Bob Bennett Ford. R. 744, lines 14-18; R. 745, lines 18-21; R. 746, lines 3-4.

[2] According to the apartment lease, Petitioner and Portia were married. R. 337, line 22 – R. 338, line 6.

– R. 672, line 1. A Customs and Border Protection agent encountered Petitioner on June 17, 2006, in Washington. R. 356, lines 9-25. The agent performed a criminal history check on Petitioner, which indicated Petitioner was a missing person. R. 356, lines 18-22; R. 361, lines 12-23; R. 386, lines 7-22. The agent contacted WCPD, the reporting agency. R. 363, lines 13-19. WCPD told Bresee that Petitioner was a suspect in a double homicide. R. 364, lines 3-5.

Based on this information, the Border Protection agents conducted two searches of Petitioner's person and a search of his two bags. R. 364, lines 5-7; R. 364, lines 23-25; R. 387, line 2 – R. 388, line 8; R. 394, line 11 – R. 395, line 1. Items in Petitioner's possession were sent to WCPD. R. 390, line 1 – R 391, line 7; R. 395, lines 5-8; R. 409, line 7 – R. 411, line 8; R. 507, line 22 – R. 508, line 4. At 3:10 a.m. on June 18, 2006, WCPD informed Border Protection that an arrest warrant had been issued for Petitioner on the charge of grand larceny. R. 395, lines 18-25.

About an hour later, a local deputy served a warrant for grand larceny on Petitioner and transported Petitioner and his property to the county jail. R. 437, line 20 – R. 439, line 18; R. 441, line 24 – R. 442, line 21. The deputy claimed Petitioner denied any involvement with the car listed in the warrant; rather, Petitioner stated he travelled with a friend and then by bus. R. 527, lines 18-19; R. 529, line 7 – R. 530, line 6. Petitioner explained that he lived with Portia and Angelica, had quit his job, left to visit Canada, and planned to return to South Carolina. R. 531, line 16 – R. 532, line 23; R. 534, line 20 – R. 535, line 3.

On June 19, 2006, FBI agent Brenda Wilson and Glen Hutchings, a local police officer, interrogated Petitioner. R. 542, lines 1-16. Petitioner stated he quit his job on Friday, June 9, 2010, but planned to return to South Carolina. R. 591, line 12 – R. 592, line 8. Petitioner told them of his romantic relationship with Portia and how the two had become more like roommates

within the last year. R. 593, lines 4-9. Petitioner admitted he drove the car outside of South Carolina, explaining Portia was agreeable to him driving the car. R. 599, line 15 – R. 600, line 5; R. 600, lines 6-18.

The car was found in Seattle on June 18, 2006. R. 646, line 23 – R. 647, line 18; R. 651, lines 18-24. On June 22, 2006, SLED agent Rod Green processed the car. R. 842, lines 3-23. Green found no evidence of blood, but found two sets of fingerprints on the exterior of the car near the trunk. R. 847, line 14 – R. 848, line 10; R. 851, line 21 – R. 852, line 5. Green identified three fingerprints from the second set as belonging to Petitioner. R. 860, line 19 – R. 862, line 17. He explained the three fingerprints were considered a simultaneous print, meaning they were made at the same time. R. 865, lines 2-9. When Green examined the trunk, it had a "new car smell" and did not smell strongly of cleaners or perfumes. R. 869, lines 9-12.

On August 3, 2006, WCPD transported Petitioner and his luggage to South Carolina. R. 936, lines 5-22. Petitioner's luggage was searched and the items found were used against him at trial. R. 1005, line 12 – R. 1039, line 15; R. 1048, line 5 – R. 1049, line 23; R. 1093, lines 16-17; R. 1094, line 16 – R. 1108, line 2.

SLED DNA analyst Robin Taylor developed a partial profile from a swab from the steering wheel of the car, which matched Petitioner. R. 1518, lines 8-19. Taylor developed profiles from a DNA mixture on a swab from the apartment's hall bathroom, and could not exclude Petitioner as a contributor. R. 1518, line 20 – R. 1519, line 17. A section of the carpet tested positive for blood and was a mixture of at least two individuals' DNA. The major contributor was consistent with a daughter of Theresa Brown, Angelica's mother. The minor contributor was a male, but no further conclusions could be reached. R. 1520, line 6 – R. 1521, line 1. An area on the bottom of a green chair found in the apartment, a swab from the master

bedroom sink, and a swab from a blue container found in the apartment tested positive for blood. All three contained a mixture of DNA with the major contributor being consistent with a daughter of Brown, and unidentified minor contributors. Similarly, swabs from a different area of the green chair, carpet, and master bedroom door tested positive for blood and the DNA profiles were consistent with a daughter of Brown. R. 1521, line 13 – R. 1525, line 21. The same was true for two other areas of the carpet and five sections of a sheet found near the green chair. R. 1526, line 5 – R. 1528, line 3.

Steven Derrick analyzed the blood stains found in the apartment. R. 1535, line 21 – R. 1538, line 6. On the wood portion of the undercarriage of the green chair, which was broken, Derrick found what he called a "hair transfer pattern" of blood. R. 1539, line 8 – R. 1540, line 5; R. 1546, lines 4-17. He opined that the spatter had to be caused by a medium range of force based upon the size of the droplets. R. 1541, lines 1-7. In the hair transfer pattern, Derrick found a "conglomerate of blood" that he claimed indicated a wound in the hairline where bloodletting had occurred. R. 1546, line 14 – R. 1547, line 11. Derrick further opined that something other than a natural incident occurred, specifically an assault. R. 1549, lines 114; R. 1560, lines 2-15.

The lead detective, Bayne, could not escape WCPD's failure to follow-up on numerous leads and tips indicating sightings of Portia and/or Angelica. For example, a patron at a local ice cream shop claimed she saw the two on July 1, 2006. Although WCPD inquired if the shop had video, no one spoke to the patron until six years later. R. 1607, lines 10-24; R. 1612, line 10. Angelica's teacher told police in 2006 that Angelica said she was going to Texas; WCPD conducted no follow-up regarding this lead. R. 1614, line 4 – R. 1615, line 25; R. 1620, line 14 – R. 1621, line 4; R. 1626, line 3 – R. 1627, line 20. A truck driver claimed he saw a woman fitting Portia's description at a truck stop near El Paso, Texas. The trucker said the woman

approached him asking for help because she had been left at the truck stop by her boyfriend. R. 1627, lines 21-25; R. 1631, line 6 – R. 1639, line 10; R. 1648, line 3 – R. 1649, line 19. Bayne admitted WCPD did not follow up on approximately six leads received from the National Center for Missing and Exploited Children even though five of the leads indicated sightings in California and one was for a sighting on Amtrak between Seattle and Portland. R. 1653, lines 7-23; R. 1655, line 9 – R. 1660, line 4.

Rebecca Kilbride, who was a teacher at Angelica's school, knew Petitioner because he, alone, picked Angelica up from school two or three times per week. R. 1716, line 4 – R. 1717, line 2. Additionally, George Mook, who worked with Petitioner and Portia, saw Petitioner driving Portia's car "once in a while." R. 1718, line 20 – R. 1719, line 1. On February 29, 2012, Page Moore with WCPD followed up with Barbara Williams, who had called police in 2006 claiming to have seen Portia and Angelica at an ice cream shop in Lexington County. R. 1721, line 25 – R. 1722, line 6. Although Williams had called in 2006, the first contact WCPD had with her was six years later in 2012. R. 1723, lines 21-25.[3] Matt Martin, the prosecutor's investigator, discovered Angelica's social security number was connected to a credit report showing an unpaid medical bill in California from October of 2008. R. 1727, lines 14-18; R. 1730, lines 4-9; R. 1731, line 20 – R. 1732, line 4.

Dr. Kimberly Collins reviewed the photographs from Petitioner's and Portia's apartment. She found no indication of dragging down the hallway of the apartment. R. 1452, line 23- R. 1453, line 2. The photographs further indicated there was no significant volume of blood to soak

[3] On cross-examination, Edwards admitted that WCPD responded to a tip on July 10, 2006 from Ms. Williams who claimed to have seen Portia at an ice cream shop in Pine Ridge on July 1, 2006 at 10 a.m. Although WCPD went to the ice cream shop, no one attempted to interview Ms. Williams or conduct any follow-up at that time. R. 954, line 14 – R. 956, line 16.

through the carpet because neither the bottom of the carpet nor the padding had blood on them. R. 1453, line 24 – R. 1454, line 8. She was unable to form an opinion as to the quantity of blood on the green chair as such was medically and scientifically *impossible*. R. 1454, lines 14-19. Further, she was unable to form an opinion about the type of injury that may have been present, how the injury came to be, or the severity of the injury. R. 1456, line 18 – R. 1457, line 1.

At the conclusion of the state's case, Petitioner moved for a directed verdict. Petitioner explained that the primary circumstantial evidence against him "might be termed as flight." Although blood was found in the apartment shared by Petitioner, Portia, and Angelica, no evidence tied Petitioner the alleged assault resulting in the blood evidence. R. 1699, lines 16-17; R. 1700, line 1 – R. 1707, line 21; R. 1711, line 11 – R. 1712, line 8. The judge was persuaded by "the circumstantial facts regarding the relationship among [Portia and Angelica], the extended testimony regarding their personal habits, routines, work area, their hair appointments, all that sort of thing" coupled with their "mysterious disappearance" with no communication. He found the evidence sufficient to survive a directed verdict motion. R. 1714, lines 3-20. Petitioner renewed his motion for directed verdict at the conclusion of his case. R. 1751, lines 9-14. The judge again denied Petitioner's motion. R. 1751, line 22 – R. 1752, line 5.

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E.21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529

S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

This Court granted a directed verdict in State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). Dr. Jennings Cox, who lived and worked in Savannah, was last seen alive on June 18, 1997, at his office. He borrowed a colleague's car to go to a dentist appointment. Later, he called his secretary to cancel his remaining appointments for the day. Bank records indicated he withdrew money from an ATM in Hardeeville, South Carolina during the afternoon of June 18, 1997. During their investigation, the police interviewed Bobby Ray Ware.

Ware, a truck driver who lived in Savannah, had had a sexual relationship with Dr. Cox for more than a year. On the weekend of June 14-15, Ware introduced Dr. Cox to Arnold, who was staying with Ware. According to Ware, Dr. Cox and Arnold had sex that weekend. Ware also saw Arnold with a gun during his stay. Id. at 388-389, 605 S.E.2d at 530. Ware left at 6:00 a.m. on June 17, 1997 to drive to Chicago while Arnold remained at Ware's house. On June 19,

1997, Ware received a message to contact Arnold at a specific phone number. Later, Ware contacted Arnold at the phone number, which belonged to Arnold's father who lived in Gray, Tennessee. Id. at 389, 605 S.E.2d at 530

The borrowed car was found on June 20, 1997 in a parking lot in Johnson City, Tennessee. Although there was no blood in the car, there were some unspecified scratches on it. Additionally, police recovered a fingerprint from a coffee cup lid found in the car. The fingerprint was identified as Arnold's. Id. The body of Dr. Cox was found on June 21, 1997 in Colleton County. He had been shot. No additional evidence was found at the scene. Id. at 388, 605 S.E.2d at 530. Days later, Arnold was arrested in Tennessee. Id. at 389, 605 S.E.2d at 531.

According to this Court, the fingerprint evidence established only that Arnold was in the car on the same day Dr. Cox was last seen alive; the presence of the borrowed car in the same state where Arnold was after his stay in Savannah raised only a suspicion of guilt. The prosecution presented no evidence that Arnold was at the scene of the crime. Therefore, Arnold was entitled to a directed verdict. Id. at 390, 605 S.E.2d at 531.

The Eleventh Circuit Solicitor's Office failed to present substantial circumstantial evidence that Petitioner was guilty of murder and grand larceny. The prosecutor presented evidence that Portia and Angelica were no longer in Lexington County and had no contact with family and friends for six years, which was unusual. The prosecution presented evidence that Petitioner lived with Portia and Angelica until shortly before their disappearance. The prosecution presented evidence that blood consistent with that of Brown's daughter was in their shared apartment and was indicative of an assault. Finally, the prosecution presented evidence that Petitioner left South Carolina around the time of Portia's and Angelica's disappearance.

What the Eleventh Circuit Solicitor's Office failed to present was evidence that Petitioner killed Portia and Angelica, evidence that Petitioner was present at the crime scene, which the prosecution claimed was in Lexington County, and evidence that Petitioner stole Portia's car. In fact, the evidence showed Petitioner frequently drove Portia's car with her permission, the two were involved in a romantic relationship, and the two lived together.

Concerning this issue, the Court of Appeals stated that Petitioner conceded the victims were murdered by criminal means at trial. The record disputes this finding. During the argument on the motion, trial counsel responded to the state's argument as follows: "The no-body issue of corpus delicti is not what I'm standing on." R. 1711, lines 7-8. Trial counsel elaborated, "I *can* concede it, and they can't get past Arnold. It's sort of a siren song and a red herring. That's not the issue." R. 1711, lines 11-13 (emphasis added). Thus, the record is clear that trial counsel *never* conceded Portia and Angelica died by criminal means. Rather, *even* if he conceded that point, the state's case would not survive the directed verdict motion.

The Court of Appeals also relied upon testimony of Detective Glen Hutchings regarding the grand larceny of a motor vehicle charge. According to the court, Hutchings testified that Petitioner "eventually admitted he took Portia's car without her permission, but asserted 'she wouldn't have cared anyway because she was going to lose the car.'" A careful examination of the record reveals inconsistencies in Hutchings' testimony on this point. The exchange between Hutchings and the prosecutor revealed Petitioner admitted to driving the car across the country, but Petitioner indicated Portia would not mind if he did so.

Q. What did you confront him with?

A. I advised him that we had information that he had been stopped by law enforcement in the El Paso, Texas, area driving Portia Washington's car.

Q. What was his response?

A. He said that he actually had driving Portia's car, that Portia was having difficulty making the payments on the car and that she wouldn't have -- she didn't care if he took the car because she was going to return it to the dealership or he was going to have to start making payments on it.

R. 623, lines 2-12. Thus, the record demonstrates that Hutchings initially did not testify that Petitioner admitted to taking Portia's car without her permission. In fact, Hutchings testified that Petitioner admitted to driving the car and that Portia did not care if he did so. Later, when the prosecutor asked if Petitioner admitted whether had permission to take the car, Hutchings responded, "Yes, he eventually admitted that he did not have permission. And, of course, he did add that she wouldn't have cared anyway because she was going to lose the car." R. 634, lines 17-22. The court read this as an admission by Petitioner. However, the record is clear that Petitioner only admitted that he drove the car and that Portia would not have cared if he had done so. This is the antithesis of larceny.

According to the court, the state "presented evidence that [Petitioner] was the last person seen with the victims at the place where the state alleged the murders occurred." The court found this "fact" to be "an important distinction from Arnold." The court's conclusion that Petitioner was the last person seen with the victims at the place where the state alleged the murders occurred failed to consider the equivocal and ambiguous testimony in the record regarding the last person to see or hear from Portia and the lack of evidence of where the murders, if Portia and Angelica were murdered, occurred.

Perry claimed she last saw Portia, Angelica, and Petitioner during the afternoon hours on June 10, 2006, and then at 10:30 p.m., Perry noticed Portia's car was not in the apartment complex parking lot and that their apartment was dark. However, the record is not clear that

Perry was the last person to see Portia and Angelica alive on June 10, 2006. In fact, Portia's aunt, Bellamy, saw Portia twice on June 10, 2006. The timing of these visits was unclear. Thus, the record does not support the court's conclusion that Petitioner was the last person seen with the Portia and Angelica at the place where the state alleged the murders occurred.

Although the state presented evidence that an assault occurred at the apartment where Petitioner lived with the victims, this evidence failed to demonstrate the assault was fatal or that the assault encompassed both Portia and Angelica. The DNA analysis pointed only to Angelica. Further, the fact that Petitioner's DNA was found in the apartment was hardly incriminating as he lived in the apartment.

The court further held the state presented substantial evidence of flight. While it is true the state presented evidence that Petitioner had left South Carolina around the date Portia and Angelica went missing, the evidence did not show that Petitioner had fled the state to avoid capture by the authorities. While "[e]vidence of flight has been held to constitute evidence of guilty knowledge and intent," "[t]he critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities." State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999). There was no evidence that Petitioner had knowledge that the authorities were looking for him. In fact, for the first few days of Petitioner's cross-country trip, the authorities were *not* looking for him. The record was devoid of evidence that Petitioner feared apprehension by the police. In fact, when the police initiated a traffic stop in Texas, Petitioner cooperated fully and willingly. Later, when law enforcement agents at the border questioned him, Petitioner again cooperated fully and willingly. These were not the actions of a man running from the law.

II. The trial court's refusal to use an instruction explaining how to use circumstantial evidence during his deliberations and evaluation of the evidence as fact-finder violated Petitioner's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable doubt because the instruction used failed to clarify how to evaluate circumstantial evidence.

Relevant facts

Petitioner moved for an instruction consistent with the circumstantial evidence charge found in State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997) and "the old Edwards[4] charge." Specifically, he requested "in a circumstantial evidence case, if the fact finder w[ere] to view any story that was plausible without the absence of direct evidence, they should find him not guilty. Circumstantial evidence has to be complete." R. 1752, line 17 – R. 1754, line 4. Petitioner argued that due to the nature of a capital proceeding, where the Eighth Amendment required heightened reliability, the appropriate charge would be "the old Edwards standard, which is any exception that would tend to disprove the case is sufficient to defeat the case." R. 1755, line 19 – R. 1756, line 11. The trial judge, and fact finder, responded that he would not "charge something that [was] not the law." R. 1755, lines 8-10; R. 1756, lines 12-15.

Discussion

In State v. Logan, 405 S.C. 83, 94-95, 747 S.E.2d 444, 450 (2013),[5] this Court "revisited [its] past discussions regarding the circumstantial evidence charge, and articulate[d] for the benefit of the bench and bar a circumstantial evidence charge reflecting the proper balance between the state's burden and the jury's responsibility." As this Court explained, the purpose of a clear jury instruction concerning analyzing circumstantial evidence is paramount. Id. at 97, 747 S.E.2d at 451.

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[4] State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989).

[5] Petitioner benefits from Logan. See State v. Belcher, 385 S.C. 597, 612-613, 685 S.E.2d 802, 810 (2009) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987); Harris v. State, 543 S.E.2d 716, 717-718 (Ga. 2001).

Although direct and circumstantial evidence may carry the same weight, "a jury cannot accurately analyze these two types of evidence using identical approaches." Id.

Specifically, circumstantial evidence, unlike direct evidence, "requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded." Id. Thus, "[a]nalysis of circumstantial evidence is plainly a more intellectual process." Id. at 97-98, 747 S.E.2d at 451. In light of the differing analysis required when examining direct versus circumstantial evidence, this Court provided a proper jury instruction for trial courts to use. Important for Petitioner's case, the instruction directs the fact finders that "to the extent the state relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt." The instruction also provided that "[i]f these circumstances merely portray the defendant's behavior as suspicious, the proof has failed." Id. at 99, 747 S.E. 2d at 452.

Clear instructions on how to analyze the circumstantial evidence were necessary in Petitioner's case. The instruction was necessary in Petitioner's trial due to the state rely entirely on circumstantial evidence. A proper evaluation of circumstantial evidence requires connection of collateral facts to reach a conclusion, distinguishing circumstantial from direct evidence. The Logan charge, derived from the traditional circumstantial evidence charge, informs the fact finder regarding how to analyze circumstantial evidence – inferring main facts by making connections among collateral facts.

The Court of Appeals held Petitioner's argument regarding how the fact finder was required to consider the circumstantial evidence was without merit because "his requested circumstantial charge was based on the 'reasonable hypothesis' language from Edwards, which the Supreme Court found unnecessary in Logan." Respectfully, Petitioner disagrees with the

court's reading of the record. Petitioner's request was for the fact finder to apply the following standard: "[I]n a circumstantial evidence case, if the fact finder w[ere] to view any story that was plausible without the absence of direct evidence, they should find him not guilty. Circumstantial evidence has to be complete." R. 1753, line 20 – R. 1754, line 4. Petitioner's request was not for circumstantial evidence to be equated with the exclusion of every "reasonable hypothesis." Rather, Petitioner's request was for the circumstantial evidence to be complete. As Logan held, "to the extent the state relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt." Petitioner's requested instruction merely wanted the state's evidence to be held to the constitutional burden of showing complete circumstantial evidence that the defendant was guilty beyond a reasonable doubt based upon the consistency of the circumstances pointing conclusively to guilt.

III. The seizure of evidence by the police violated the federal and state constitutions where the arrest warrant for grand larceny of a motor vehicle was not supported by probable cause due to the affiant's omission of vital information.

Relevant facts

Petitioner incorporates the facts presented in Issue I, supra. WCPD Detective Matt Edwards procured the arrest warrant for Petitioner on the charge of grand larceny with an affidavit providing: on June 14, 2006, Portia and Angelica were reported missing having not been seen since June 10, 2006; on June 14, 2006, Petitioner was ticketed in El Paso, Texas while driving alone in a 2005 Ford Focus valued at $12,000 registered to Portia Washington; on June 18, 2006, Petitioner was stopped while trying to cross the Canadian border on a bus; and the whereabouts of the vehicle were unknown. R. 449, lines 14-17; R. 451, line 14 – R. 452, line 12; R. 1813. In addition, Edwards orally supplemented the information. R. 452, line 25 – R. 453, line 1. Edwards "reiterated that [WCPD] knew the vehicle belonged to Portia, and Portia alone, through [the] DMV," that Petitioner "would not have been allowed to take the vehicle at any time" based upon conversations with coworkers and family, that Petitioner lied to the trooper when he said he was going to pick up his wife in Arizona because Petitioner was unmarried, and that Petitioner showed up in Washington alone. R. 453, lines 3 – 22.

Incredulously, Edwards *failed* to inform the magistrate that Petitioner and Portia were involved in an intimate relationship. R. 460, line 21 –R. 461, line 7. Edwards *failed* to inform the magistrate that Petitioner and Portia lived together and their lease listed them as husband and wife. R. 457, lines 4-7. Edwards *failed* to inform the magistrate that the registered owner of the car was Petitioner's live-in girlfriend. R. 461, lines 10-12. Edwards *failed* to inform the magistrate that Petitioner and Portia lived together in multiple residences over the past couple of years. R. 460, lines 17-20. Equally importantly, Edwards *failed* to inform the magistrate of any

conversations with Portia's mother in which she stated that Petitioner drove Portia's car. R. 456, lines 14-25. These omissions rendered the warrant defective because it appeared that a "random person" was found driving Portia's car. R. 473, line 19 – R. 476, line 12. Petitioner summarized his argument as follows:

> At the end of the day it's acting as a judge who would have been asked to sign that probable cause warrant, is the omission of the fact, even if their family didn't like it, that they had a relationship over two years where they lived together in the same home, more important than what on the face of that warrant appears like a stranger/stolen car case. And that's exactly how it was presented to the judge. Detective Edwards said he never made mention of [Portia and Petitioner]'s relationship.

R. 487, lines 14-23.

Ultimately, the judge ruled that "based upon the information that the West Columbia Police detectives had at that time," the information they presented to the magistrate was sufficient to establish probable cause. R. 491, lines 6-10. However, the judge acknowledged that "certain facts [were] left out." R. 491, lines 11-17.

Discussion

Petitioner's right to be free from an arrest not based upon probable cause is rooted in the United States Constitution and the South Carolina Constitution. See U.S. Const. IV; S.C. Const. Art. 1, § 10. An arrest warrant must be based upon probable cause. "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances to believe likewise." Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992); see also State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996); Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990); Gist v. Berkeley County Sheriff's Dep't, 336 S.C. 611, 615, 521 S.E.2d 163, 165 (Ct. App. 1999). If the warrant affidavit is insufficient to establish

probable cause, it may be supplemented by sworn oral testimony before the magistrate. State v. Crane, 296 S.C. 336, 338, 372 S.E.2d 587, 588 (1988); State v. Sachs, 264, S.C. 541, 216 S.E.2d 501 (1975). Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001)(citing Weeks v. United States, 232 U.S. 383 (1914), Mapp v. Ohio, 367 U.S. 643 (1961), Wolf v. Colorado, 338 U.S. 25 (1949)).

In Franks v. Delaware, 438 U.S. 154, 171-172 (1978), the United States Supreme Court held that the Fourth and Fourteenth Amendments gave defendants the right to challenge the veracity of warrant affidavits after the warrants were issued and executed in certain circumstances, including where the affidavit omits necessary information. Applying Franks, this Court found probable cause lacking in State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999) because the officer acted recklessly in making a false statement and in omitting exculpatory information. Id. at 555, 524 S.E.2d at 397. The officer testified that although the affidavit contained the sentence indicating that an individual told a confidential informant that the individual had crack, the individual never said this. Additionally, the officer testified that he neglected to place in the affidavit that the informant had visited the individual's house and informed the officer that no crack was there and that the individual said he was not going to cook crack in his house because his wife was trying to go straight. Id. at 553, 524 S.E.2d at 396. Examining the affidavit by excluding the false information and inserting the exculpatory information, this Court concluded that the affidavit failed to support a finding of probable cause to search the individual's house. Id. at 555, 524 S.E.2d at 397.

Despite a presumption that the Fourth Amendment did not require an affiant to include all potentially exculpatory information in the affidavit, this Court found the information omitted in

Missouri went "to the very heart of the affidavit's purpose," which was to establish probable cause to search the individual's apartment for crack cocaine. The omitted information did more than create "some uncertainty," rather it created "an affirmative hurdle which the remaining portions of the affidavit must overcome." Id. at 555-556, 524 S.E.2d at 397-398. The combination of the officer's false statement and omission of critical facts "pollute[d] the affidavit to the extent that a magistrate could not have found that probable cause existed to issue the search warrant." Id. at 556, 524 S.E.2d at 398.

Turning to Petitioner's case, Edwards sought and obtained an arrest warrant for grand larceny, which is the felonious taking and carrying away of goods of another of a certain monetary value. See State v. Parker, 351 S.C. 567, 571 S.E.2d 288 (2002). Additionally, the taking must be done with the intent to deprive the true owner of his property and to convert it to the use of the offender. State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002). Thus, Edwards was required to provide the magistrate with evidence to support a probable cause determination that Petitioner feloniously took and carried away Portia's car with the intent to deprive Portia of the use of the car and convert the car to his own use.

Edwards failed to inform the magistrate either in writing or orally that Petitioner and Portia lived together in a romantic relationship, which included holding themselves out as husband and wife, and family members, friends, and co-workers had witnessed Petitioner driving Portia's car in the past. The omitted facts go to the "very heart of the affidavit's purpose" because the information not relayed to the magistrate exculpate Petitioner from having stolen Portia's car, or at a minimum, did more than create some uncertainty. A reasonable person would not believe Petitioner was guilty of the crime of grand larceny knowing Petitioner and Portia lived together in a romantic relationship and Petitioner had driven the car in the past.

The Court of Appeals found Edwards "did not recklessly or intentionally omit the information that was not relayed to the magistrate." First, the court examined Edwards' failure to tell the magistrate that Jones, Portia's mother, had seen Petitioner driving Portia's car. The court held Edwards could not have conveyed this information to the magistrate because he had not spoken with Jones at the time he obtained the arrest warrant. However, law enforcement had been in constant contact with Jones in the days following Jones' report that Portia was missing. The state cannot be shielded from Jones' knowledge simply because law enforcement sent an officer who knew only what was told to him to obtain the arrest warrant. The knowledge of the entire police force must be imputed to Edwards despite what he knew personally. Second, the court found that Edwards could not have informed the magistrate that Petitioner and Portia's apartment lease indicated they were married because he had not seen documents concerning their marital status when he obtained the arrest warrant. These conclusions are erroneous based on the facts in the record, and these conclusions omit several key considerations.

The court concluded that "[e]ven including the omitted information that [Petitioner] and Portia were in an intimate relationship and had been living together for several years, the information would have also revealed that the relationship was troubled." Although some evidence revealed a troubled relationship, other evidence indicated Portia was happy in her relationship with Petitioner. Nevertheless, the inclusion of even a troubled relationship in the warrant was necessary in order for the magistrate to understand that the person in Portia's car in Texas was someone with whom Portia had a very close relationship, not a stranger. The close relationship would tend to show permission to use the car, not larceny of the car. The court admitted the evidence of a prior relationship "might have offered an innocent explanation" for

Petitioner's use of the car. Petitioner submits the prior relationship absolutely offered an innocent explanation for why Petitioner was in the car.

CONCLUSION

Petitioner respectfully requests this Court grant the writ and order full briefing on the issues presented.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 5th day of June, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5304 (S.C. Ct. App. filed March 18, 2015)
2007-GS-32-525, 2008-GS-32-2652, & 2008-GS-32-2653

THE STATE,

RESPONDENT,

V.

KENNETH ANDREW LYNCH,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on J. Anthony Mabry, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Kenneth Andrew Lynch #350750, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210 and the S.C. Court of Appeals this 5th day of June, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of June, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022

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SC Court of Appeals

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June 5, 2015

J. Anthony Mabry, Esquire
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: The State v. Kenneth Andrew Lynch

Dear Anthony:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the S.C. Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

SBH/smf

Enclosures

cc: Court of Appeals